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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

No. 324

ELGIN, JOLIET & EASTERN RAILWAY COMPANY, a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The opinion of the Appellate Court is reported in abstract form as *Borrero* v. *Elgin, J. & E. Ry. Co.*, 28 Ill. App. 2d 362, and in the syllabus form at 171 N.E. 2d 673. The opinion in full is printed as an appendix to the petition for writ of certiorari.

JURISDICTION.

The jurisdictional facts are set forth in the petition for writ of certiorari.

QUESTIONS PRESENTED.

Where the record affirmatively shows that the decision of the court below is in accord with the decisions of that court and this Court further review will not be allowed.

1. Whether to the maximum extent proper, questions rising under the Federal Employer's Liability Act should be left to the jury and where the jury could reasonably find that the route to the bus used by the laborers, under the conditions portrayed, was not a reasonably safe place to work, the trial court was justified in submitting an instruction that included "a reasonably safe place to work" as a ground of liability.

2. Whether cross-examination which tended to show that the plaintiffs below had a conscious knowledge of dangers involved raised a presumption of assumption of risk, rather than contributory negligence, and justified an instruction on the question even though the issue was not raised by the pleadings in the case.

REASONS FOR DENIAL OF THE WRIT.

Respondents in opposition respectfully urge:

1. The decision of the Appellate Court of Illinois is in accord with the prior holdings of the courts of that state and with the holding of this Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350.

2. Where cross-examination shows an attempt to develop an evidentiary basis for use of the defense of the doctrine of assumed risk by changing its name to contributory negligence, the courts will not sacrifice the servant's rights by charging him with assumption of risk under another name. (*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.)

STATUTE INVOLVED.

The only statute involved is the Federal Employer's Liability Act, Title 45, U.S.C., secs. 51, 53 & 54. The pertinent parts are set forth in the petition.

ADDITIONAL STATEMENT OF THE CASE.

Chavez, the acting foreman, testified that he was about a thousand feet behind Valentin, the man in the lead (Abst. 26), and most of the men had not yet reached the bridge (Abst. 26). Julio Cruz was just getting ready to enter the bridge when he saw the train coming. He signaled with his hand, "but the people in the train didn't see me and they kept going. They were inside the train and weren't looking anywhere (Abst. 15)." Cruz signaled while the train still had three quarters of the bridge to traverse (Abst. 16). When he looked into the cab of the engine he couldn't see anyone in the cab (Abst. 16).

Harry Sprinkle, the engineer, testified that he was standing as he approached the bridge (Abst. 74) and he continued standing as he crossed so he could have a better view of the block signal (Abst. 75), that his practice as an engineer was to glance at it practically all the time (Abst. 75). He stated that at the speed he was travelling he could have stopped 300 feet with an emergency application of the brakes (Abst. 77); that when he was 300 feet from the bridge he could see the top part of the bridge and "I could not see whether there was anyone on the bridge unless they were moving (Abst. 78)". He saw no one there that day (Abst. 78), but on the day prior he had seen section laborers working south of the bridge; that "you get used to seeing them around (Abst. 79)." He

testified that an engineer is sometimes notified when there are men working at a certain location and that he was not notified that there were men working south of the bridge on this day (Abst. 82). He also testified that if he were looking forward at all times from the time the train straightened off that curve and went into the mouth of the bridge he could see the men in front of him (Abst. 84); that he was looking straight ahead, not up, but saw nobody (Abst. 84).

ARGUMENT.

I.

UNDER THE FACTS OF THIS CASE, SUBMISSION OF A "SAFE PLACE TO WORK" AS A GROUND OF LIABILITY IS SQUARELY WITHIN THE HOLDING OF THIS COURT IN BAILEY V. CENTRAL VERMONT RY., 319 U.S. 350, AND SUBSEQUENT DECISIONS.

We submit the petitioner has whooly misinterpreted *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325. That case was tried on the question of furnishing a wrench which was not suitable for the work to be done and the plaintiff sought to make the defective wrench the basis of a charge or failure to provide a safe place to work, arguing that the conditions under which he had to work increased the hazard from the use of the defective wrench. This Court correctly rejected that contention.

The safe place to work concept also includes safe ingress and egress to and from the place of work. See: *McCray* v. *I.C.R.R. Co.*, (1957) 12 Ill. App. 2d 425. The defendant in this case sent men to work in a location which demanded at least the ordinary amount of care on its part. The crew members could not expect this non-scheduled train to appear without signaling or warning of any kind. The engineer testified that at times it was a practice that the engineer be notified that there were men working on the track (Abst. 82). He further testified that at times the railroad would station men at certain spots to warn the men of an approaching locomotive when they are laying rails and "*it is a dangerous place* and visibility is bad, to the locomotive engineer and to the men that are working on the tracks." (Abst. 83) These conditions cer-

tainly existed at the time of this accident and yet no precautions of any kind were taken for the safety of the men.

The matter was in issue in *Pitrowski* v. *N.Y.C. and St. L. R.R. Co.*, 4 Ill. 2d 125, 129-130, where the court said that only where there is complete absence of probative facts tending to show negligence should the court take the case from the jury and decided the issue of negligence as a matter of law. On the issue of a safe place to work the court stated:

> "Likewise, the question of whether defendant was negligent in not taking additional measures to furnish its employees with a safe place to work was a question of fact for the jury. The Appellate Court had no right to hold, as a matter of law, that defendant was under no duty to inspect before this switching operation was commenced. The jury was properly entitled to find, as it apparently did, that it was negligent for defendant to conduct the switching in an unlighted yard without first inspecting to ascertain whether the track was clear of dangerous obstacles. In *Williams* v. *Atlantic Coast Line Railroad Co.*, (5th Cir.) 190 F. 2d 744, the court said: 'The employer must make proper tests and inspections to discover dangers in the places where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety of the employees.' Whether defendant made proper tests and inspections in the instant case was a proper question for submission to the jury and this it was error for the Appellate Court to reverse the verdict and judgment in favor of plaintiff."

The train certainly constituted a danger to men on the bridge and the jury could, and did, under all the facts, find that the railroad failed to take "reasonable precautions for the safety of its employees."

Certainly, in a case such as this, where the railroad had men working in the area of the bridge and was running non-scheduled trains and then took no care or precaution for men it knew were working in the area, it cannot say the "safe place to work" doctrine has no application.

The evidence shows the men, plaintiffs included, were walking toward the bus under order of Chavez. The two men ahead of plaintiffs were only 20 feet from the mouth of the bridge and, having a view of the curve, were able to see the train in time. Plaintiffs were 60 feet or more back of them (Abst. 19, 27, 62); they were carrying tools; the footing was poor (Abst. 38, 62) (Addt'l. Abst. 9) causing them to have to be "looking up and looking down." The acting foreman, Chavez, who should have been at the forefront of the group to warn them or put them on notice, was, instead, bringing up the rear. He was more concerned with any tools that might be dropped or his own safety (Abst. 22) than with the safety of the men. Chavez, as acting foreman, saw the train coming from the other direction (Abst. 22). He then gave the "vamos" order. It was clearly his duty, as acting foreman, to warn the men of the perils of the situation. No warning was given; no precautions were taken; the plaintiffs did not have a "safe place to work".

Under these facts, the place to work was rightfully in issue. Because of the nature of a track laborer's work it is obvious that they must work on and cross bridges. Other than the tracks themselves, there was no walkway for the workers. The facts are such as to bring the case squarely within the holding of the Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350.

The court below, in its opinion correctly followed the decisions of the Illinois Supreme Court as set forth in

Pitrowski v. *New York, C. & St. L. Ry. Co.*, 4 Ill. 2d 125, and *Bonnier* v. *C. B. & Q. R.R. Co.*, 2 Ill. 2d 606. The Illinois courts, since the enunciation of the principles applicable, have consistently followed the holding of this Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350. The true expression of the concept, as set forth in the *Bailey* case, is that the employer has a duty to use reasonable care in furnishing his employees with a safe place to work and it is a duty which becomes more imperative as the risk increases; it is a continuing duty from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

We submit that petitioner seeks, not to prevent an erosion of the *Michalic* case, but to erode the holding in *Bailey*.

II.

WHERE CROSS-EXAMINATION SHOWS AN ATTEMPT TO DEVELOP AN EVIDENTIARY BASIS FOR THE USE OF THE DEFENSE OF THE DOCTRINE OF ASSUMED RISK, THE PLAINTIFFS WERE ENTITLED TO AN INSTRUCTION COVERING THE DOCTRINE, AND THE DEFENDANT WAS NOT PREJUDICED, PARTICULARLY SO, WHEN AN INSTRUCTION GIVEN AT THE DEFENDANT'S REQUEST COVERED THE DEFENSE OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE NEGLIGENCE.

Petitioner's brief (P. 16), relies heavily on the opinion of Goodrich, *J.*, in *Potter* v. *Brittan*, (C.A. 3), 286 F. 2d 521, and *Seaboldt* v. *Pennsylvania R. Co.*, (C.A. 3) 290 F. 2d 296. However, it is worthy of note that the learned jurist, quoting leading text writers, defined assumption of risk as action taken with a conscious knowledge of the danger faced with a resulting negation of the defendant's duty. For the convenience of the Court, respondents have

reproduced defendant's cross-examination of the plaintiffs in their appendix to this brief. While it is possible to say that the questions were designed to show contributory negligence, the overwhelming trend of the questioning was obviously of such a nature as to attempt to show that the plaintiffs *knew* the dangers they faced.

The Illinois Appellate Court had this cross-examination before it in an additional abstract of record filed by plaintiffs in that court and we are certain the Appellate Court composed, as petitioner states, of experienced jurists, did not err in appreciation of the distinction between "assumption of risk" and "the carelessness of the plaintiffs themselves".

The holding in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, held that the defense of assumption of risk, by whatever name it was called, had been swept into the discard. This is most certainly true. Nevertheless, the fact remains that defendants are constantly seeking ways and means of removing the doctrine from the dustbin. The *Tiller* case enunciates a clear principle, well known in the law. Assumption of risk, prior to the amendment and the *Tiller* case, was such a good defense it is difficult for defendants in FELA cases to relinquish. The courts, and rightly so, are constantly being required to strike the defense which is raised under one guise or another and mainly, as here, as that of "non-negligence". The defendant's cross-examination clearly showed an attempt to bring out an awareness of the perils faced; it was clearly questioning designed to show a conscious awareness of danger.

Further, and most important, the instruction did not deprive the defendant of its partial defense of plaintiffs'

contributory negligence and the principle of comparative negligence. Instruction No. 12 (Abst. 115), given at plaintiff's request, recognized defendant's right to the defense and stated that any negligence on part of the plaintiffs, while it would not bar a recovery, would entitle the defendant to a proportionate reduction of damages.

Most important of all, the defendant also covered the point in instruction No. 6, given at its request. This instruction is as follows:

> "You are instructed that it was the duty of the plaintiffs in this case at the time and place of the accident in question to exercise ordinary and reasonable care for their own safety and protection, and if you believe from the evidence that they failed to exercise such care, and you further believe from the evidence that such failure on their part to exercise ordinary and reasonable care for their own safety was the sole cause of the accident resulting in their injuries, then you are instructed that such plaintiffs are not entitled to recover in this case. If you believe from the evidence that any such failure on their part to exercise ordinary and reasonable care for their own safety contributed with the negligence of the defendant to cause the injury of which they complain and the damages which they claim to have sustained, then you are instructed that such plaintiffs are not entitled to recover the full amount of the damages sustained by them but the damages shall be diminished in proportion to the amount of negligence attributable to them."

Had there been a failure to instruct the jury on the effect of plaintiffs' own negligence there might be merit in its contentions. However, the jury was fully and carefully instructed. In view of the tenor of the cross-examination, we submit that it would have been error to refuse the instruction on assumption of risk. Failure to give

the instruction would most certainly have raised the doctrine of "assumption of risk" under the name of "non-negligence" on part of the defendant.

Respondents respectfully submit that the questions presented by the petitioner were carefully and correctly considered by the courts below and that the decision is in full accord with the prior holdings of this Court.

Respectfully submitted,

FRED LAMBRUSCHI,
Attorney for Respondents.

APPENDIX.

WITNESSES

189 RALPH BORRERO, a plaintiff herein, called as a witness on his own behalf, having been previously duly sworn, testified further through an interpreter as follows:

Cross Examination by Mr. Hackbert.

Q. Mr. Borrero, you don't know whether or not you had ever worked at this particular location before this day of the accident, is that right?

A. Well, I don't think—I can't remember.

Q. When you came to that place that morning to start work, which side of the bridge did you walk up, the north end of the bridge or the south end of the bridge?

A. Well, on the northwest side.

Q. You were working out there at the place almost eight hours that day, weren't you?

190 A. Yes.

Q. And while you were working there, that day, there were trains operating over the railroad tracks going in both directions, weren't there?

A. I do not understand that question well.

Q. While you were working there, that day, did trains go over those tracks?

A. Yes.

Q. And some of the trains were going toward Kirk Yard and some of the trains were coming away from Kirk Yard, weren't they?

A. Yes.

Q. There were two railroad tracks side by side at the place where you were working, weren't there?

A. Yes.

Q. Sometimes the train would be on one of the tracks and at other times other trains would be operating on other tracks, is that right?

A. Would you repeat that question, please?

(The question was repeated by the interpreter.)

The Witness: A. You mean while I was working?

Mr. Hackbert: Q. Yes.

The Witness: A. Yes.

191 Q. You'd been working as a track laborer for about a year?

A. Well, I was working there for about ten months.

Q. And you knew, when you were working on the railroad tracks, that a train might come along any time, didn't you?

A. I did not.

Q. You'd seen trains operating over those tracks that day, hadn't you?

Mr. Lambruschi: I object, your Honor, he already answered the question.

The Court: Cross Examination. Objection overruled. Have you finished your question?

Mr. Hackbert: Yes.

Repeat the question, please.

(The record was read as requested.)

The Witness: A. Yes, but we were work.

Mr. Hackbert: Q. And as you started to cross the bridge, on your way back to the bus, there was one train then on the bridge, wasn't there?

The Witness: A. No, one was leaving the bridge.

283 *Cross Examination of Jose Gonzales Gomez. by Mr. Hackbert.*

Q. After you started working for the E.J. & E. on April 16, 1957, did you work steadily up until the time of this accident on November 19, 1957?

A. Yes.

Q. Was your work for the E.J. & E. all along the main line tracks, or sometimes did you work with your crew in Kirk Yard?

A. Well, I know that I use—we use to work in every place pertaining to Kirk Yard. Now I don't know what you mean when you say that is some place else, meaning that is the main tracks.

Q. Had you worked out along the tracks where the trains operated before this particular time?

A. Yes.

Q. And you worked out in the country on the railroad tracks, did you?

284 A. Yes, in the country. Well, I used to work wherever they sent me.

Q. Sometimes it would be on the tracks in the yard and sometimes out on the main tracks where the trains were?

A. Well, the thing is that they use to take—they used to transport us by bus, and we went to work, you know, here and there, wherever they sent us. Well, what do you mean by working in the Kirk Yard or working in other places on the main lines of the track?

Q. Well, let's see if I can explain it.

In Kirk Yard there are many railroad tracks side by side, aren't there?

A. Yes.

Q. And on those tracks they move the cars back and forth and switch them around, don't they?

A. Yes.

Q. And out on the main line tracks they operate the trains with an engine at the head end and the cars and a caboose at the rear end of the train?

A. Well, which one is the main line that you are referring to?

Q. The tracks that you were working on on—

285 Mr. Lambruschi: Let him explain. He said something here. Pardon me. What did he say?

The Witness: Well, there are many tracks there. I don't know which one is the main line.

Mr. Hackbert: Q. Well, the main line is—Strike that out.

The tracks on which you were working that day you were hurt are main line tracks.

The Witness: A. Well, are you telling me that is a main line, because I don't know if it is or not.

Q. Yes. I am telling you.

Now, have you worked out along those tracks at other times during the eight months or so that you worked for the railroad?

A. What do you mean? Just a minute. When do you mean? When did I work on those lines?

Q. Any time from April to November, 1957.

A. Yes, sir.

Q. When you were working out on those tracks you saw trains moving over both sets of tracks, didn't you?

A. Well, when we were fixing the tracks, I do not remember.

286 Q. When the trains would come along, when you were fixing the tracks, you'd get off the tracks and

stand off to the side until the train went by, wouldn't you?

A. Well, if we were working both tracks and one train was coming on this track, when—they used to move to the other track and let the train pass, and the people that were working on the other track kept working.

Q. When there were trains moving on both tracks you'd get off the tracks to the side?

A. Well, I never saw two trains passing at the same time.

Q. You knew that one set of tracks was used for the trains going toward Gary and the other set of tracks was used for trains going away from Gary?

A. What do you mean, the tracks where we were working, or the tracks that were under where we were working?

Q. The tracks where they were working.

A. Well, I know that one of the tracks, I know that the trains go toward the place where we have our office; but the other one, I don't know if the trains are going to Gary, I don't know if they go to Gary.

287 Q. As you were working out there near this bridge where the accident occurred, you'd been there three or four days before the accident?

The Interpreter: Repeat that.

Mr. Hackbert: Strike that out.

Q. Had you been working near this bridge for two or three or four days before the day you were hurt?

The Witness: A. Yes.

Q. And while you were working there, those three

or four days, trains came by, some going one way and some going the other way, didn't they?

A. That I do not remember well.

Q. Did you pay any attention to the trains as they came along those tracks while you were working there?

A. You mean where I was working?

Q. Yes.

A. Well, when I was working, there was a train coming, I wasn't paying attention, because the foreman was the one that was taking care of that.

Q. How would you learn when a train was coming?

A. When?

288 Q. When you were working along the tracks near this bridge?

A. Well, if by any chance there was a train coming then Pedro is the one that used to give us the warning, because they use to give us a warning on the tracks.

The Court: "Used to clear the tracks," I think he said.

The Interpreter: I beg your pardon?

The Court: The last part, "gave us a warning, used to do that to clear the tracks," I think he said.

The Interpreter: No, I didn't say that. I am going to ask the question again.

The Court: It isn't important.

The Interpreter: Would you repeat the question.

(The record was read as requested.)

The Witness: A. Well, sometimes the train whistled, if not then Pedro, that was in charge, was the one to give us the warning that the train was

coming. I do not remember in any occasion that a train was passing while we were working.

Mr. Hackbert: Q. In all of the eight months that you worked for the railroad did trains pass the place where you were working?

289 The Witness: A. Yes, sir.

Q. And sometimes the train would whistle and sometimes some one in the crew would call out that a train was coming, is that correct?

Mr. Lambruschi: I object to the form of the question. Number one, it's repetitious. Number two, he said not the crew, but he said the foreman was the one who was in charge of giving the orders.

The Court: He is a member of the crew. He said some member.

Mr. Lambruschi: He just repeated the same thing. We have been going over that.

The Court: Let him answer that. Objection overruled.

Mr. Hackbert: Would you read the question.

(The record was read as requested.)

The Witness: A. That is right. Sometimes the train will whistle and sometimes they use to give us the warning that a train was coming.

Q. Now, when you started out on the bridge on your way to the bus this afternoon of November 19, 1957, there was one train already passing over the bridge, wasn't there?

A. Well, there was a train passing the bridge,
290 but it was almost leaving the bridge.

Q. But it was still on the bridge at the time you went out on the bridge?

A. It was leaving the side where I was entering the bridge.

Q. And was that train moving faster than you were walking, or was it moving slower than you were walking?

A. Well, it is a natural thing that the train was going faster than me.

Q. How much faster was the train going than you were walking?

A. Well, I think that the train—maybe the train was going about 30 or 35 miles, but I don't know.

Q. There were two men in your crew who went on the bridge ahead of you?

A. Yes.

Q. And they were about 60 or 70 feet ahead of you, were they?

A. More or less. That is what they told me that they were at that distance; but I am not sure of it.

Q. Were you watching those men as you were walking across the bridge?

A. When I was walking on the bridge I was look-
291 ing up and down.

Q. When you looked up would you see those two men who were ahead of you on the bridge?

A. Well, sometimes I saw them and sometimes I did not see them, because that was a real fast, because I had to look back down again, because it was danger underneath.

Q. You would just look up very quickly and then look down again?

A. Well, I was looking more down than up, because I was watching—I was watching the floor.

Q. Did you hear either one of those men call out a warning that a train was coming?

A. No.

Q. Did you see either one of those men or anyone else on the bridge get out of the way of the train?

A. No.

Q. Did you see the train that hit you at any time.

A. No.

Q. Were you ahead of Borrero or behind him?

A. I was in front of him.

Q. Did you see Borrero hit by the train?

292 A. Well, he was behind me and the train hit me first.

Q. Were you going across the bridge at the same rate of speed as the men who were ahead of you?

A. Well, I was walking with a natural step, being careful not to fall down.

Q. As you went across the bridge, did you stay about the same distance behind those two men as you were when you started on the bridge?

A. Well, I know that they were ahead of me, but I can not tell you the distance when I entered the bridge, because I don't know. I tell you about the distance when I was already on the bridge, because they told me about the distance.

Q. Were you paying any attention to those men who were ahead of you?

A. I was paying attention—Well, the two men that were in front of me—I was paying attention to what I was doing, because I was walking, and I was looking, at the same time, up and down.